IN THE SUPREME COURT OF MISSOURI

SC 92564

VICTOR ALLRED,

Respondent/Cross-Appellant,

v.

ROBIN CARNAHAN,

Respondent,

and

THOMAS SCHWEICH,

Appellant/Cross-Respondent,

and

MISSOURI JOBS WITH JUSTICE

Respondent/Cross-Appellant

On Appeal from the Circuit Court of Cole County
Honorable Jon E. Beetem

REPLY BRIEF BY INTERVENOR/RESPONDENT/ CROSS-APPELLANT MISSOURI JOBS WITH JUSTICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Court Cases

Other Sources

REPLY ARGUMENT

I. Plaintiff Sets Up a Straw Man by Arguing Incorrectly that Section 116.175, RSMo., Requires "an Independent Assessment," Then Knocks Down that Straw Man with a Distorted Reading of the Court's Factual Findings on Fairness and Sufficiency.

Plaintiff claims that Section 116.175, RSMo – giving the Auditor the responsibility to draft fiscal notes and fiscal note summaries for initiative petitions -- is an unconstitutional delegation of authority to the Auditor, in violation of Article IV, Section 13 of the Missouri Constitution. As explained in Intervenor's Opening Brief, this is a facial challenge to the statute, and does not depend on the facts. Nor, as set forth in more detail below, can Plaintiff make this an "as applied" challenge. The Constitution either gives the Auditor the authority to assess the fiscal impact of a measure or it does not. That delegation does not depend on how well the Auditor does the job.

Notwithstanding, Plaintiff continues to argue the facts. He states that the Auditor undertakes "absolutely no 'independent analysis or research' other than to paste the responses into the fiscal note for the petition." (Pl.'s Response Brf. at 2.) This is not a complete picture of the facts. While the trial court's conclusions of law state that the Auditor transcribes responses into the fiscal note almost verbatim, (Judgment at 15), Plaintiff completely ignores the court's other findings of fact on the fiscal note process. In particular, the trial court adopted the parties' Joint Stipulation and found that the Auditor's office "reviews the submissions of state and local governmental entities, along

with the submissions of proponents or opponents of the measure, for completeness and reasonableness;" and that, "[i]f the Auditor finds a response to be unreasonable, that affects the weight given to that response in preparing the fiscal note summary." (Judgment at 6-7; Jt. Stip. at ¶ 20-21.) Thus, Plaintiff through the Joint Stipulation agrees that the Auditor reviews submissions (and information in them) that he receives, agrees that the Auditor makes his own determination as to whether a submission is reasonable, and agrees that the Auditor assesses the significance of submission (i.e., whether to give "weight" to it) based upon its reasonableness in deciding whether to use it in communicating to voters the fiscal consequences of a proposed measure through the fiscal note summary.

The record shows that the Auditor is gathering and reviewing information and analyzing it for purposes of drafting the fiscal note summary. Mr. Halwes sent inquiries to 50 different governmental entities. (Tr. 80-81.) He reviewed the responses and accounted for non-responses in determining that the direct costs of the measure would exceed $1 million. (Tr. 91-92.) He also took care to verify the source documents referenced in the proponent's revenue estimate, (Tr. at 46, 48, 106), and recreate some of the calculations, (Tr. at 48), before he concluded that the estimate "was not unreasonable." (Tr. at 91-92.) Plaintiff argues that the Auditor should have followed up with the City of St. Louis because its response did not provide a direct cost number. Plaintiff simply speculates that St. Louis left off this number. In addition, this argument requires the Auditor to second guess every response and non-response.

Plaintiff creates a straw man by arguing that Article IV, Section 13 of the Constitution and Section 116.175, RSMo., requires "an independent assessment" – that the Auditor must go beyond the materials submitted to him, follow-up with governmental entities about their responses, and research assumptions and issues on his own. Plaintiff then knocks down this straw man with a distorted summary of the facts. But, the issue is not what Plaintiff opines is a proper investigation. The issue is: what is the meaning of "investigation" and "assess." By defining himself what the Constitution and statute requires, and then glossing over the facts, Plaintiff side-steps the issue. His straw man argument fails.

II. An "Assessment" under Section 116.175, RSMo. is Synonymous As a Matter of Law with an "Investigation" under Article IV, Section 13.

Plaintiff argues in Point I of his Response that Section 116.175, RSMo., does not call for an investigation. Plaintiff relies on the dictionary definition. Webster's defines "investigate" as a systemic examination. Another definition is to conduct an official inquiry. *Merriam-Webster Online Dictionary*, available at http://www.merriam-webster.com/dictionary.

However, nowhere does Plaintiff seek to define the other critical term – "assess." Section 116.175 states that the Auditor "shall assess the fiscal impact of the proposed measure." Whether the General Assembly unlawfully delegated a power to the Auditor depends on whether an assessment is an investigation. If an "assessment" is an "investigation," then Section 116.175 comports with Article IV, Section 13. If it is not,

then in no case does the Auditor have the authority to assess the fiscal impact of a proposed measure and draft a fiscal note and fiscal note summary even if done perfectly.

To "assess" means "to determine the importance, size, or value of" something. *Merriam-Webster Online Dictionary*, available at http://www.merriam-webster.com/dictionary. The word "assess" is synonymous with "investigate." To assess something, you may inquire about it, solicit comments about it, review it, and examine it. A systemic, official inquiry such as the Auditor undertakes meets the definition of an investigation. The Constitution requires no more.

In reality, Plaintiff's argument about the Auditor's constitutional authority is a complaint about how well he thinks the Auditor is doing his job. Plaintiff would not be advancing the constitutional argument, and would agree that the terms "investigation" and "assess" are synonymous, if the Auditor had hired Plaintiff's expert, Dr. Macpherson, to produce a fiscal note. Just as the Constitution gives the Auditor the power to undertake audits, good and bad, it gives him the power to assess the fiscal consequence of a proposed measure. The quality of the Auditor's work product in a particular case presents a statutory issue, but not a constitutional one of his power to undertake the work.

III. *Farmer* Actually Supports a Finding that the Auditor Has the Power to Assess the Fiscal Consequences of a Proposed Measure.

Plaintiff puts great reliance on *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc. 2002). Intervenor addressed this case in its Opening Brief. (Intevenor's Opening Brf at 19-20.) But, Plaintiff's new arguments require a reply. Notably, Plaintiff fails to note

several factors that distinguish the constitutional provision at issue here, involving the Auditor, with the provision in *Farmer* on the Treasurer.

First, Article IV, Article 13 includes express authorization for the Auditor's actions. It allows other investigations as required by law. In contrast, Article IV, Section 15 only allows the Treasurer to act as a custodian of funds. The difference here is that the Auditor is exercising a power he already has under the Constitution – to make an investigation required by law -- while the Treasurer was trying to create a new power that the Constitution did not give her.

Second, in *Farmer*, other officials besides the Treasurer held the power to collect money. Here, no other official has the express power to draft a fiscal note.

Plaintiff notes that the Constitution gives the Governor the authority to submit a yearly budget to the general assembly, and suggests that power is akin to forecasting of revenues and expenditures. Article IV, Section 24 of the Constitution authorizes the Governor to undertake a specific task (submitting a budget), with specific requirements (available revenues and itemized plan of proposed expenditures), directed to a specific body (the general assembly), during a specific time of year (within 30 days of being convened). The Governor's authority for this task is limited. By contrast, Article IV, Section 13 leaves "investigations" open ended to those "required by law." It does not expressly restrict investigations to certain governmental bodies, to certain times of year, or to specific information.

Plaintiff also argues, following *Farmer*, that assessing the fiscal impact of a proposed measure is not related to the supervising and auditing of the receipt and expenditure of public funds. Intervenor addressed this point in detail in its Opening Brief. Suffice it to say, the word "investigation" in Article IV, Section 13 is not expressly limited to backward looking reviews of money spent and received.

IV. Plaintiff Cannot Make an "As Applied" Challenge in His Claim that Section 116.175 Delegates Authority to the Auditor in Violation of the Constitution.

Plaintiff argues in Point II.D.3 that, if its facial challenge fails, then the Court may strike down Section 116.175 as applied. This is a novel statement, unsupported by the cases that Plaintiff cites. The argument that a statute unlawfully delegates authority to a state official is a facial challenge, not an as applied challenge.

First, it bears mentioning that Plaintiff now argues that *Missouri Municipal League v. Carnahan (MML I)*, 303 S.W.3d 573 (Mo. App. W.D. 2010), should be reversed. Plaintiff never made this argument to the trial court, and is precluded from doing so now. *See State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. 2000) (issue that was never presented to or decided by the trial court is not preserved for appellate review).

Second, Plaintiff argues that the Court could agree that Section 116.175 be construed as allegedly demanded by the Auditor, and thus fall short of an investigation. However, as already noted above, the plain language of the Constitution sets forth the Auditor's authority, not Plaintiff's opinion as to what a proper investigation should be.

Third, Plaintiff cites to no case allowing an as applied challenge to an alleged unconstitutional delegation of authority by statute. The delegation case he primarily relies on – *Farmer* – was a facial challenge that turned solely on the law and the Court's interpretation of the Constitution. It does not indicate that a delegation can be challenged on an as applied basis. *Elam v. City of St. Ann*, 784 S.W.2d 330 (Mo. App. E.D. 1990), was a zoning case as applied to a particular tract of land. It did not involve the duties of a state official or interpretation of the Constitution. *Beatty v. State Tax Commission*, 912 S.W.2d 492 (Mo. 1995), challenged the constitutionality of a statute on assessing taxes as a retrospective law and as violating the Constitution's contract clause. It did not involve the constitutional duties of a state official. Intervenor cited *Beatty* merely for a definition of a facial challenge. It does not stand for the proposition that a plaintiff can bring an as applied challenge to a statute's delegation of duties to a state official.

Plaintiff's claim on the facts highlights the absurdity of his position. It would turn every case questioning whether a state official was performing well, such as the Treasurer in holding funds, the Auditor in drafting fiscal notes or undertaking an audit, or the Secretary of State in overseeing elections and corporations, into a constitutional challenge. This is unprecedented. In this case, it would make the Court the arbiter for whether the Auditor should have contacted 100 or 75 instead of 50 governmental entities about direct costs to them, or should have second-guessed whether the City of St. Louis (or the County of Jasper for that matter) has any minimum wage employees, or properly relied on assumptions about average hours of work of minimum wage employees in

calculating revenue increases, or reached the right conclusions in the policy debate about the minimum wage and job loss. This is not in any case the job of the Court. It would, through the guise of constitutionality, insert the Court into the policy debates surrounding initiative petitions that it should avoid.

V. Intervenor Has Properly Raised a Question Concerning the Clarity of the Court's Order and its Potential Impact on the Constitutional Right of Initiative Petition.

Plaintiff opposes Intervenor's request that the Court clarify the trial court's remedy in the event it upholds the trial court's judgment on the constitutionality of Section 116.175. Plaintiff's claim that Intervenor should have raised this claim earlier and that he cannot meaningfully respond is unavailing. At trial, when the court heard argument on the constitutionality of Section 116.175, counsel for Intervenor specifically raised this issue: "And there is a more fundamental point, which is the constitution itself has no requirement of a fiscal note. So to the extent that the statute may be unconstitutional, it would be Intervenor's position that the fiscal note process should simply fall away and that any petitions that -- any signatures that are collected on petitions bearing a fiscal note or fiscal note summary should not be affected by any ruling on the constitutionality." (Tr. 25-26.)

Article III, Sections 49 gives the power to the people to enact laws by initiative petition. It makes no mention of a fiscal note or fiscal note summary. Intervenor was obviously relying on this provision in the Constitution. As explained in Intervenor's

Opening Brief, it would unduly frustrate the people's fundamental power of initiative petition if the presence of an unconstitutional fiscal note summary invalidated signatures.

Plaintiff also misunderstands the argument. Intervenor is not contending that Sections 116.175 or another statute is unconstitutional. Nor is Intervenor arguing that the court erred in the remedy. The question is whether the remedy is clear. In *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392 (Mo. 1996), where the Court found the statute making the Committee responsible for preparing fiscal notes to be unconstitutional, the Court ordered the Secretary of State to remove the fiscal note summary from the ballot and allowed the vote on the measure to go forward. The Court can do the same here. If it finds Section 116.175 to be unconstitutional, despite the arguments above and in the previous briefs, it should take the opportunity to clarify that the fiscal note summary should not appear on the ballot and that, subject to the Secretary of State's review of submitted signatures, the people may still vote on the measure.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) this brief contains the information required by Rule 55.03;

(2) this brief complies with the limitations contained in Rule 84.06(b);

(3) there are 2,877 words in this brief.

/s/ Christopher N. Grant
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of June, 2012, a true and correct copy of the Reply Brief of Intervenor/Respondent/Cross-Appellant Missouri Jobs with Justice was served by electronic mail on each of the following individuals:

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